

FILED

Mar 24 2021

SUSAN Y. SOONG
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EPIC GAMES, INC.,
Plaintiff,

v.

APPLE INC.,
Defendant.

Case No. 20-cv-05640-YGR (TSH)

DISCOVERY ORDER

Re: Dkt. No. 378

Pursuant to Federal Rule of Civil Procedure 26(b)(2)(A), Apple moves to increase the length of its deposition of Epic Games' expert witness Dr. David S. Evans from seven hours to 14 hours of record time. Epic opposes the request, but argues in the alternative that if the Court grants it, then it should give Epic an equivalent extension in the aggregate to use in the depositions of Apple's experts Dr. Richard Schmalensee and Dr. Lorin Hitt.

By way of background, in this expert-heavy case Epic has disclosed the opinions of three economists (Dr. Evans, Dr. Susan Athey, and Dr. Michael I. Cragg), while Apple has disclosed four (Dr. Schmalensee, Dr. Hitt, Dr. Francine Lafontaine, and Dr. Daniel L. Rubinfeld). In the letter brief, the parties spend time comparing the aggregate length of each side's economists' opinions. This is hard to do because all of Apple's economists had opening reports that were then subsumed and incorporated into their rebuttal reports, meaning that all four are both affirmative and rebuttal experts, and you wouldn't want to add the length of their opening reports to the length of their rebuttal reports because that would be double counting. If you just add up the pages of the integrated rebuttal reports, Apple's economists account for 679 pages of expert reports (287 for Hitt, 125 for Lafontaine, 58 for Rubinfeld, and 209 for Schmalensee). That's not that far off from the 834 pages you get from adding up Evans' opening report (476), his rebuttal report (177),

1 Athey's opening report (70), and Cragg's rebuttal report (111). Still, adding up pages is not a
2 perfect way to compare the two sides because the different reports are formatted differently.
3 Apple estimates that if you don't double count its opening reports (which are subsumed in its
4 rebuttal reports), the word count for the two sides' reports is roughly the same (294,969 words for
5 Epic and 303,144 words for Apple).

6 The Court is unpersuaded that the answer to this motion has anything to do with the
7 aggregate length of each side's economists' reports. Rather, the question is whether there is good
8 cause to extend the length of any particular expert's deposition. If Apple had 20 economists, and
9 each wrote a 50-page report, that would amount to 1,000 pages of reports, but there would be no
10 basis to extend the length of any of the depositions because seven hours is enough time to depose
11 someone about a 50-page report. The aggregate page or word count is, after all, affected by the
12 number of experts, which doesn't have anything to do with how many hours are needed for a
13 given deposition. Apple focuses on comparing aggregates and argues that it is fair for each side to
14 have the same number of total deposition hours for the economists' depositions. But since Apple
15 has four economists and Epic has three, the Court fails to see why that is fair.

16 Let's turn to Evans. His reports total 653 pages. Expert reports of that length easily justify
17 14 hours of deposition. And the issue is not just how long his reports are. The Court has reviewed
18 the economists' reports *in camera*, and Evans' opinions cover nearly every disputed economic
19 issue in this lawsuit. Epic is using Evans to cover the waterfront. There is nothing wrong with
20 Epic doing that, but both Epic and Evans must have understood that expert opinions of such scope
21 and length would necessitate two full days of deposition. Denying Apple 14 hours with which to
22 depose Evans would unfairly prejudice Apple's ability to take discovery into his opinions.

23 The Court rejects Epic's argument that if Apple gets an additional X hours, then out of
24 parity Epic should also get an additional X hours to depose Hitt and Schmalensee. As discussed
25 above, the good cause showing focuses on the number of hours that are reasonably needed to
26 depose an expert, not on false equivalencies between the two sides. Having said that, Hitt's 287-
27 page integrated report and Schmalensee's 209-page integrated report merit more than the default
28 seven hours for deposition. And again, the issue is not just the number of pages but the

1 substantive scope of the reports. An extra half day for Epic to depose Hitt and Schmalensee is
2 justified by the nature of their reports.

3 Accordingly, the Court orders that Apple may depose Evans for 14 hours, and Epic may
4 depose Hitt and Schmalensee each for 10.5 hours. The hearing previously scheduled for March
5 25, 2021 is vacated.

6 **IT IS SO ORDERED.**

7
8 Dated: March 24, 2021

9 
10 THOMAS S. HIXSON
11 United States Magistrate Judge
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28